Marquette Law Review

Volume 38
Issue 4 *Spring 1955*

Article 7

Constitutional Law - Validity of Zoning Ordinances Discriminating against Private Educational Institutions

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RECENT DECISIONS

Constitutional Law—Validity of Zoning Ordinances Discriminating against Private Educational Institutions—The plaintiff, the Wisconsin Lutheran High School Conference, owned land in a class "A" residence zone in the city of Wauwatosa, Wisconsin. When the Conference applied for a building permit to construct a private high school with adjacent athletic grounds, Sinar, the building inspector, refused permission. Sinar refused on the grounds that the zoning ordinance for the class "A" area specifically prohibited the building of private secondary schools. Objecting to the fact that the ordinance permitted construction of a *public* secondary school, the plaintiff brought an action in mandamus to compel Sinar to issue the permit. *Held*: No unconstitutional or otherwise illegal discrimination appears in the ordinance by reason of its exclusion of private high schools from "A" zones, while allowing public schools of the same rank. There is a material distinction between public and private schools in that the public schools serve the entire area without discrimination. Justice Steinle in his dissent, which was concurred in by Justice Broadfoot, maintains that there is no substantial distinction between public and private high schools in the same area because both would serve the same purpose of educating the children of the community and vicinity. *State ex rel. Wisconsin Lutheran High School Conference v. Sinar et al., 267 Wis. 91, 65 N. W. 2d 43 (1954).*

The governmental power to zone, like all police powers, is limited by provisions of the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of the United States has ruled that "such restriction cannot be imposed if it does not bear a substantial relation to public health, safety, morals, or general welfare."[1] The Wisconsin Supreme Court in *State ex rel Ford Hopkins v. Mayor*[2] stated:

> "This court has applied the following general rules upon which classification may be based in the exercise of police power:
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> (1) All classification must be based upon substantial distinctions which make one class really different from from another.
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> (2) The classification adopted must be germane to the purpose of the law.
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> (3) The classification must be based upon existing conditions only.

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[1] Nectow v. City of Cambridge, 277 U.S. 183, 48 Sup. Ct. 447, 72 L.Ed. 842 (1928).

[2] State *ex rel.* Ford Hopkins Co. v. Mayor, 226 Wis. 215, 276 N.W., 311 (1937). See also 8 McQUILLIN, MUNICIPAL CORPORATIONS, 3rd ed., §25.61, and 12 AM. JUR., *Constitutional Law* §481, p. 153.

(4) To whatever class a law may apply it must apply to each member thereof."

The majority opinion in the instant case admits that the courts of other states, in *Catholic Bishop of Chicago v. Kingery*[3] and *City of Miami Beach v. State ex rel. Lear*,[4] on practically identical fact situations, have held this type of classification violative of the Fourteenth Amendment to the Constitution of the United States. The Wisconsin Court, however, finds a material difference between public and private schools because the private school does not make the same contribution to the public welfare. Justice Brown writing the majority opinion states:

"But when we come to the 'promotion of the general welfare of the community' * * * 'Ay, there's the rub.' The public school has the same features objectionable to the surrounding area as a private one, but it has also a virtue which the other lacks, namely, that it is located to serve and does serve that area without discrimination. Whether the private school is sectarian or commercial, though it now complains of discrimination, in its services it discriminates and the public school does not. Anyone in the district of fit age and educational qualifications may attend the public high school. It is his right. He has no comparable right to attend a private school. To go there he must meet additional standards over which the public neither has nor should have control. The private school imposes on the community all the disadvantages of the public school, but does not compensate the community in the same manner or to the same extent. If the private school does not make the same contribution to the public welfare this difference may be taken into consideration by the legislative body in forming its ordinance."

In support of its decision the court cites four decisions: *McCarter v. Beckwith*,[5] *Golf, Inc. v. District of Columbia*,[6] *Cincinnati v. Wegehoft*,[7] and *State ex rel. Carter v. Harper*.[8] The court contends that they are analogous. The *Beckwith* case[9] upheld a distinction made between a private and public park. A distinction made between a private and public driving range was upheld in the *Golf, Inc.* case.[10] The *Wegehoft* case[11] upheld an ordinance which allowed a fire station in a zone where no other non-residence structures were allowed. The *Harper* case[12] gave approval to a distinction made between a private

[3] Catholic Bishop of Chicago v. Kingery, 371 Ill. 257, 20 N.E.2d 583 (1939).
[4] City of Miami Beach v. State *ex rel.* Lear, 128 Fla. 750, 175 So.537 (1937).
[5] McCarter v. Beckwith, 247 App. Div. 289, 285 N.Y.S. 151 (1936).
[6] Golf, Inc. v. District of Columbia, 67 F.2d 575 (D.C. Cir. 1933).
[7] City of Cincinnati v. Wegehoft, 119 Ohio 136, 162 N.W. 389 (1928).
[8] State *ex. rel.* Carter v. Harper, 182 Wis. 148, 196 N.W. 451 (1923).
[9] *Supra*, note 5.
[10] *Supra*, note 6.
[11] *Supra*, note 7.
[12] *Supra*, note 8.

transportation corporation and a wholesale and retail milk dairy business because of the public interest involved in the transportation corporation.

Judge Steinle, in the dissenting opinion, contends that the only difference between public and private schools is that one is organized and maintained as one of the institutions of the state, whereas the other is maintained by private individuals, and that this is not a substantial enough distinction to support the restriction. The *Catholic Bishop of Chicago* case[13] and *Miami Beach* case[14] are cited in support of this position and also *Phillips v City of Homewood,*[15] *Lumpkin v. Township Committee of Bermonds,*[16] *State v. Northwestern Preparatory School*[17] and *Yanow v. Seven Oaks Park, Inc.*[18]

This writer believes that the *Catholic Bishop of Chicago* case[19] and the *City of Miami Beach* case,[20] which the majority admits are identical in fact to the present situation, but which it rejects, appear more persuasive than the Wisconsin attitude. In the *Catholic Bishop of Chicago* case[21] the court states:

> "We fail to perceive to what degree a Catholic school of this type will be more detrimental or dangerous to the public health than a public school. It is not pointed out to us just how the pupils in attendance at the parochial school are any more likely to jeopardize the public safety than the public school pupils. Nor can we arbitrarily conclude that the prospective students of the new school will seriously undermine the general welfare. As a matter of fact such a school, conducted in accordance with the educational authorities is promotive of the general welfare.

The court in the *City of Miami Beach* case[22] also held that there was no substantial relation between this type of classification and the public safety, health, morals, comfort, or general welfare.

Phillips v. City of Homewood, [23] decided in 1951, comes to the same conclusion on facts practically identical with the instant case. In this case a comprehensive zoning ordinance which had allowed both public and private schools in a particular zone was amended to include only public schools. The court in rejecting this type of

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[13] *Supra,* note 3.
[14] *Supra,* note 4.
[15] Phillips v. City of Homewood, 255 Ala. 180, 50 So.2d 267 (1951).
[16] Lumpkin v. Township Committee of Bermonds, 134 N.J.L. 428, 48 A.2d 798 (1946).
[17] State v. Northwestern Preparatory School, 228 Minn. 363, 37 N.W.2d 370 (1949).
[18] Yanow v. Seven Oaks Park, Inc., 11 N.J. 341, 94 A.2d 482 (1953).
[19] *Supra,* note 3.
[20] *Supra,* note 4.
[21] *Supra,* note 3.
[22] *Supra,* note 4.
[23] *Supra,* note 15.

restriction points out significantly that "no case or authority to the contrary has been cited to us and we found none."[24]

There are still other analogous decisions which involved zoning ordinances that allowed public and church supported schools in a particular zone but not other private schools.[25] Such ordinances were not upheld. The *Northwestern Preparatory* case supports the view that "so far as purposes of the ordinance are concerned there is no difference between public and parochial schools on one hand and private schools on the other."[26]

The term "discrimination" used in the majority opinion in the instant case to describe the admission policies of private schools is not only vague but misapplied. If the court meant by discrimination something contrary to the public welfare it should have explained in detail what it considered to be violative of the public welfare in the admission policy of private schools. It would seem, on its face, that *for those students whom it does educate,* the private school serves the general welfare in the same manner as the public school does for the students *it* educates. Indeed it has been held "that the end of both private and public schools must be the same—education of children of school age."[27]

It should also be noted that the cases cited by the majority are really not in point at all. While these cases were logically decided they cannot be construed to prove that there is a distinction between public and private schools significant enough to support the unequal treatment in the zoning law question. In the *Beckwith,*[28] *Golf, Inc.*[29] and *Harper* cases,[30] the ordinances did not allow a private park, private driving range, or a privately owned wholesale and retail milk business. It cannot be said that these private interests which were barred were in any sense on an equal footing with a private school as to their contribution to the public welfare. In the *Wegehoft* case,[31] the reason why a fire station was allowed in a residential zone is transparently clear.

The grave danger in the philosophy of the principal case is that it can be used by communities to zone out private schools completely from all residential areas. They could then be built and maintained in only the business and industrial areas, or outside city limits. If it is not arbitrary to make a distinction between a public and private school in a class "A" zone there seems to be no reason why it cannot be

[24] *Ibid.*
[25] *Supra,* notes 16, 17, 18.
[26] *Ibid.*
[27] State v. Counort, 69 Wash. 361, 124 P. 910, 41 L.R.A. 957 (1912).
[28] *Supra,* note 5.
[29] *Supra,* note 6.
[30] *Supra,* note 7.
[31] *Supra,* note 8.